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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Siskiyou)

M.P.,

Petitioner,

v.

THE SUPERIOR COURT OF SISKIYOU COUNTY,

Respondent;

SISKIYOU COUNTY HUMAN SERVICES
DEPARTMENT et al.,

Real Parties in Interest.

C063978

(Super. Ct. No.
SCSCJVSQ07-5051001)

M.P. (petitioner), the father of J.H. (the minor), seeks an extraordinary writ to vacate the order of the juvenile court setting a hearing pursuant to Welfare and Institutions Code section 366.26.¹ (Cal. Rules of Court, rule 8.452.) In a previous proceeding before this court following an earlier, similar order by the juvenile court in this matter, we granted petitioner relief based on a lack of substantial evidence to

¹ All further statutory references are to the Welfare and Institutions Code.

support the juvenile court's finding that return of the minor to petitioner would pose a substantial risk of detriment to her.

(*M.P. v. Superior Court* (May 6, 2009, C060979) [nonpub. opn.]..)

We remanded the matter with instructions that, depending on the circumstances existing on remand, the minor was to be returned to petitioner's custody. (*Ibid.*)

The juvenile court conducted a new hearing and, after receiving evidence on the current circumstances surrounding the matter, concluded for a second time that return of the minor to petitioner would create a substantial risk of detriment to her.

Petitioner again seeks relief from this court, contending the juvenile court erred by not returning the minor to his custody or providing him additional services.² This time around, petitioner cannot prevail.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2007 a dependency petition was filed by the Siskiyou County Human Services Department (the Department) concerning the two-month-old minor, who was born with severe medical problems, including gastroschisis (an abnormality of the placement of the intestines, which was corrected shortly after the minor's birth) and craniosynostosis (in which the skull bones are inflexible and fused, prohibiting normal brain

² Petitioner also questions whether evidence regarding his conduct following remand of the matter but prior to the new hearing was properly considered by the court. The juvenile court was entitled to consider any evidence bearing on the minor's current circumstances as of the time of the rehearing. (See, e.g., *In re S.D.* (2002) 99 Cal.App.4th 1068, 1083.)

growth). Staff at the hospital, as well as the minor's doctor, expressed concern that the mother did not appear able to care for the minor without assistance, and she did not obtain necessary support services. In addition, the petition alleged that petitioner, who lived with the mother at the time, initially was unaware of the mother's neglect of the minor. Furthermore, petitioner and the mother were late in making a follow-up medical appointment for the minor that they had been instructed to schedule.

The allegations in the petition were sustained and reunification services were ordered. Objectives for petitioner included that he demonstrate an ability to provide adequate care for the minor's special needs, and services were geared toward teaching him to care for a medically fragile infant.

At the six-month review hearing, the mother's reunification services were terminated and services for petitioner, who was no longer living with the mother, were continued. Meanwhile, the minor received surgery to repair her skull.

By the time of the 12-month review, it had been determined that the minor needed additional surgery because the back of her skull was fusing together. Additionally, she had suffered multiple respiratory infections requiring emergency care and daily breathing treatments, and she had chronic ear infections. The minor was receiving physical therapy through the Far Northern Regional Center and was being seen at U.C. Davis Medical Center for follow-up care.

Petitioner was having regular, unsupervised visitation with the minor, including weekly, three-hour visits in his home, and he continued to cooperate with all services. However, his driver's license was suspended and there was concern that he would not be able to take the minor to medical appointments.

At the 12-month review hearing, the juvenile court ordered six more months of services for petitioner.

Prior to the 18-month review, the foster mother filed a "Caregiver Information Form," in which she reported that, during a visit, petitioner had misidentified the minor's asthma attack as a cough, and the foster mother had to take the minor to the emergency room after the visit. The foster mother attached a calendar noting numerous medical appointments for the minor that petitioner had missed or for which he arrived late, dates on which the minor was "filthy" when she returned from visits, and occasions on which petitioner did not dress the minor appropriately for cold weather. The minor's pediatrician also expressed concern about petitioner's ability to care for the minor's multiple medical needs and to follow through with recommendations for treating her upper respiratory infections and asthma.

Petitioner continued to cooperate with service providers, and the minor spent weekends with him as well as two extended holiday periods. Petitioner planned to move closer to his family once the minor was returned so they could help him with her care.

At the original 18-month review hearing, the social worker testified that she felt the minor should be returned to petitioner. She acknowledged various concerns, including the facts that petitioner still did not have a valid driver's license, lacked personal cleanliness, and smoked outside the house, and that the minor's diet lacked fruits and vegetables. However, she did not feel these concerns were obstacles to reunification.

The paternal grandmother testified that if the minor were returned, she would be available to provide backup care and would help petitioner financially if he needed it.

The minor's pediatrician testified that the minor's problems with respiratory infections and asthma had lessened over the preceding six months and her asthma would "probably eventually not be a problem." Her previous two exams had been normal except for her head shape, although she still needed to be watched closely whenever she got a respiratory infection. According to the pediatrician, being around someone who smoked would not be a problem for the minor if the smoking occurred only outside. He also felt it would not be "terribly harmful" for the minor to be exposed to someone whose clothes or person were dirty as long as she was kept clean. The pediatrician had various concerns regarding petitioner's ability to care for the minor, although he acknowledged that his concerns had decreased and he could not say "to a reasonable medical certainty" that petitioner could not care for the medical needs of the minor.

The juvenile court found by a preponderance of the evidence that returning the minor to petitioner would create a substantial risk of detriment to her based on a number of factors: (1) the minor's health problems and the fact that placement with petitioner would move the minor several hours away from the foster parent, who was "the one consistent caregiver from [the minor's] life"; (2) petitioner had no driver's license and depended on walking, getting rides from others, and public transportation, which the court felt could expose the minor to automobile exhaust, the cold, and "whatever contagious issues people on buses have"; (3) the distance between petitioner's residence and the paternal grandparents; (4) petitioner's "difficulties with hygiene," which raised a concern that he would not be able to keep the minor "in a hygienic state"; (5) petitioner's inability to describe an appropriate approach for getting fruits and vegetables into the minor's diet; and (6) petitioner's difficulty describing the names of the minor's medications and the frequency with which they were administered. Consequently, the court terminated reunification services and set the matter for a hearing pursuant to section 366.26 to select and implement a permanent plan for the minor.

Petitioner sought an extraordinary writ in this court, arguing there was insufficient evidence to support the juvenile court's finding that it would be detrimental to return the minor to his care. We granted the petition and instructed the

juvenile court to order the minor returned to petitioner, depending on the circumstances existing on remand.

In the meantime, the minor suffered bouts of pneumonia in March and May 2009. In addition, another surgery was scheduled to place screws in the minor's skull to assist it with expanding. Following the surgery, the minor's caregiver would need to turn the screws a little every day for approximately two months; eventually, the screws would be surgically removed.

The minor's pediatrician submitted a letter stating that the minor "continue[d] to have episodes of severe wheezing," which could escalate quickly to "significant respiratory distress," and she needed to be monitored closely for flare-ups of her asthma. The pediatrician now felt the minor should not be around anyone who smoked or whose clothing smelled like smoke, and that it would pose a danger if petitioner were responsible for her postsurgery care.

Letters were submitted to the court from a program specialist with Parent Infant Programs, Inc., and the minor's physical therapist, both attesting to petitioner's cooperation and aptitude in utilizing the information imparted during those services. Meanwhile, petitioner had moved closer to his family but still did not have a driver's license and planned to use public transportation or rides with family members to get around.

Petitioner's visits with the minor were increased to include weekends in his home. After some visits, he failed to return the minor's medication to the foster parent, and the

amount of medication returned after one visit indicated he had not administered the correct amount to the minor.

The social worker acknowledged that neither the foster parent nor the minor's pediatrician felt petitioner was capable of properly caring for the minor, but based on petitioner's participation in services and the assistance his mother and stepfather would provide, she initially opined that the minor could be returned to his care "with careful monitoring by medical professionals."

The minor's surgery was scheduled for July 2009. Although petitioner was instructed not to give the minor vitamins for a specified number of days prior to surgery, he continued to give them to her, maintaining his mother said this would not be a problem. According to the social worker, the minor's surgery could have been canceled because the preoperative instructions were not followed.

During surgery, it was discovered that cranial sutures previously released in the minor's skull had fused together again, creating cranial pressure. Consequently, a bone graft was performed on the front of the minor's skull instead of the procedure originally contemplated. The minor would need to be seen monthly to assure that the problem with her sutures did not recur, and the other surgery would need to be rescheduled. Petitioner said he would not allow the minor to have another surgery "because it was 'purely cosmetic'" when, in fact, not having further surgeries would put the minor at risk of mental retardation.

Petitioner was directed to give the minor the majority of her care while she was in the hospital following her surgery. Despite being instructed on how to make arrangements for food and lodging for himself while the minor was in the hospital, petitioner made no arrangements and had no money to obtain food during his stay. Petitioner was permitted to stay in the minor's hospital room, where he "slept most nights," leaving the foster mother to take care of the minor when the minor awoke at night. He also slept through some of the doctors' rounds and had to obtain the information discussed during rounds from the foster mother. Petitioner was observed to miss the minor's cues when she was in pain and seemed unable to answer questions about when the minor last had pain medication or how to ask for medication for the minor.

The social worker also learned that petitioner's mother, who was "an important part of the Department's safety plan" for placing the minor with petitioner, had "four or five different jobs and travels most of the time," "is often out of cell phone range," and is "rarely home."

Based on petitioner's "inability to provide the highly skilled, consistent care" needed by the minor, the social worker changed the recommendation from returning the minor to petitioner to terminating services and setting a section 366.26 hearing.

At the contested hearing, petitioner testified he had quit smoking nine weeks earlier. According to petitioner, the purpose of the minor's next surgery was to "reshape the back of

her skull to get rid of the flat spots," and he did not believe it was necessary for any other purpose.

Petitioner's mother denied stating she was often out of cell phone range or that she was rarely home. She testified that if the minor were returned to petitioner, her role would be to provide transportation when needed and to babysit on occasion if she was available.

The foster mother and the Department's "nurse case assistant" confirmed that petitioner did not appear capable of caring for the minor's medical needs.

The juvenile court found by a preponderance of the evidence that return of the minor to petitioner would create a substantial risk of detriment to her safety, protection, or physical or emotional well-being. The court based its finding on the fact that petitioner "d[id] not have an understanding of [the minor's] medical condition adequate to enable him to provide all the essential care necessary to safeguard her physical well[-]being," could not "adequately follow instructions given to him by [the minor's] medical staff," and could not "awaken himself at night to provide necessary care for [the minor]." The court found the credibility of petitioner and his mother "lacking in numerous important respects" and rejected their testimony to the extent it conflicted with other evidence. The court again terminated reunification services and set the matter for a hearing pursuant to section 366.26 to select and implement a permanent plan for the minor.

DISCUSSION

Petitioner argues that, as at the original 18-month review hearing, none of the circumstances existing at the time of the rehearing supported a finding that return of the minor to his care would create a substantial risk of detriment to her. Petitioner is incorrect.

At an 18-month review hearing, the child must be returned to the parent's physical custody unless a preponderance of the evidence establishes that return would create a substantial risk of detriment to the child's safety, protection, or physical or emotional well-being. (§ 366.22, subd. (a).) We review the juvenile court's finding in this regard for substantial evidence. (*Robert L. v. Superior Court* (1996) 45 Cal.App.4th 619, 625.)

Here, the evidence before the juvenile court at the time of the original 18-month review hearing was that the minor's respiratory problems had improved and were expected eventually to resolve. By the time the juvenile court considered the matter again following remand, the minor had contracted pneumonia twice and continued to have significant respiratory problems. In addition, unforeseen problems concerning the minor's skull had emerged during her most recent surgery. Thus, in contrast to the minor's circumstances at the first 18-month review hearing, it had become clear that her medical condition was extremely fragile by the time of the second hearing.

What also had become clear was that petitioner was unable to consistently provide the highly competent care required for

the minor. Petitioner was directed to give the minor the majority of her care while she was in the hospital, providing him the opportunity to demonstrate that he would be able to adequately care for her if she were returned to him. The record is replete with examples of his failure to follow through with the care needed by the minor: he failed to follow preoperative instructions not to give her vitamins; he did not wake up at night in the hospital when the minor awoke after her surgery; he slept through doctor's rounds; he did not pick up on the minor's cues that she was in pain; he was not able to provide information regarding when the minor last had pain medication; and he did not know how to request pain medication for her. Contrary to petitioner's argument that none of the problems relied on by the juvenile court was sufficient to refuse to return the minor to him, petitioner's inattentiveness to the minor during a period when her medical needs were acute established there would be a substantial risk of detriment to her in his care. Combined with the evidence that petitioner would not have the amount of family support necessary to compensate for his shortcomings in caring for the minor, there was ample support for the juvenile court's finding that returning the minor to petitioner's care would create a substantial risk of detriment to her.

Petitioner also argues that additional reunification services should be provided to him because no services were provided after the original 18-month review hearing. He fails to cite any legal authority to support this argument. The

record before us does not establish that petitioner asked for additional services when the matter was remanded, nor did he argue at the rehearing that there were extraordinary circumstances warranting the extension of services beyond the 18-month limit for such services. (See *In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1798-1799.) Accordingly, we reject this argument as well.

DISPOSITION

The petition for extraordinary writ is denied.

RAYE, J.

We concur:

SCOTLAND, P. J.

SIMS, J.